

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JAMES MYRON,)	No. C 99-21265-JW (PR)
)	
Plaintiff,)	ORDER AFTER REMAND
)	
vs.)	
)	
CAL TERHUNE, et al.,)	
)	
Defendants.)	
_____)	

Plaintiff in the above titled action filed a pro se civil rights complaint under 42 U.S.C. § 1983 with several other inmates. On February 25, 2000, the Court dismissed with leave to amend several of plaintiffs' claims against prison officials at Salinas Valley State Prison ("SVPS"), including the first claim in which they alleged, among other things, "overcrowding and understaffing," and "oppressive cell conditions." The Court dismissed without leave to amend plaintiffs' eighth claim that their First and Fourteenth Amendment rights were violated when SVSP prison officials refused to allow them to start a political action committee and a prison newspaper as frivolous. Plaintiffs never amended. On October 17, 2001, the Court ordered service of two cognizable claims: 1) denial of access to the courts, and 2) inadequate medical care while incarcerated at SVSP. The Court granted defendants' motion for summary

1 judgment as to these two claims on March 30, 2004.

2 Only plaintiff Myron appealed from this Court's *sua sponte* dismissal of six of
3 his claims and from summary judgment on the two remaining claims. On December
4 3, 2007, the Ninth Circuit Court of Appeals affirmed in part, reversed in part,
5 dismissed in part, and remanded the case for further proceedings. The Ninth Circuit
6 affirmed summary judgment and all of the *sua sponte* dismissals except for two
7 claims. The Court of Appeals reversed and remanded for further proceedings
8 plaintiff's first and eighth claims which were dismissed *sua sponte*, stated as follows
9 respectively: 1) "overcrowding and understaffing" and "oppressive cell conditions";
10 and 2) the violation of First and Fourteenth Amendment rights when prison officials
11 refused to allow plaintiff to start a political action committee and access to
12 newspapers and magazines.

13 With respect to plaintiff's first claim, the Ninth Circuit held as follows:

14 The district court dismissed most of Myron's first claim and held
15 that because Myron's challenges regarding "overcrowding and
16 understaffing" and "oppressive cell conditions" did not allege physical
17 injury, 42 U.S.C. § 1997e(e) barred the claim entirely. However, in
18 *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002), we ruled that section
19 1997e(e) only restricts the availability of certain types of relief
20 (monetary damages in some instances), while leaving open the
21 possibility of nominal and punitive damages. We held that section
22 1997e(e) did not bar claims entirely, but merely restricted the available
23 types of relief. *Id.*

24 The district court therefore erroneously dismissed much of
25 Myron's first claim. We reverse that ruling and remand. As such,
26 Myron's as-applied Eighth Amendment challenge to the statute is moot.
27 See *Cantrell v. City of Long Beach*, 241 F.3d 674, 678(9th Cir. 2001).
28 We dismiss that portion of Myron's appeal.

Because we are reversing on statutory interpretation grounds, we
do not reach Myron's facial constitutional challenges to the statute.

Memorandum at 2-3. (Docket No. 90.)

With respect to plaintiff's eighth claim alleging violations of his First and
Fourteenth Amendment rights, the Ninth Circuit held as follows:

Myron first alleges prison officials have prevented him from
forming a political action committee. The government can regulate
prisoner organization activities if it can show that its restrictions are
"rationally related to the reasonable... objectives of prison
administration. *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S.

119, 129 (1977); *accord Shaw v. Murphy*, 532 U.S. 223, 229 (2001) (“When a prison regulation impinges on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests”) (quotation marks and citation omitted).

Because the district court dismissed Myron’s complaint *sua sponte*, the defendants have not yet offered any justification for the restriction, and none is contained in Myron’s complaint. Because no legitimate penological interest has yet been offered, we must reverse the dismissal of this claim and remand.

Myron next alleges that he has been denied access to newspapers and magazines. “It is well settled that the First Amendment protects the flow of information to prisoners; any limitation must reasonably relate to a legitimate penological interest.” See *Crofton v. Roe*, 170 F.3d 957, 959 (9th Cir. 1999). Because the record does not yet contain any justification for the restriction, we must reverse dismissal and remand this claim.

Memorandum at 7.

In accordance with the decision of the Ninth Circuit, the Court will allow these claims to proceed on the merits and orders service of the complaint upon defendants.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, (a) copies of the complaint in this matter, (b) all attachments thereto, (c) copies of this Order, and (d) copies of the Order issued on February 25, 2000, upon the following defendants: Cal Terhune, Gary Lindsey, G.E. Harris, Ylst, Alfonso K. Fillon, D.A. Mayle, Carl Larsen, A.A. Lamarque, Hamilton, Solis, Basso, Mandeville, Carillo, Alexander, Padilla, Shipman, Marriott, Don Chesterman, and John H. Burk at Salinas Valley State Prison. The clerk shall also mail courtesy copies of the complaint and this order to the California Attorney General’s Office. The clerk shall also serve a copy of this Order on plaintiff.
2. No later than **sixty (60) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the amended complaint found to be cognizable above.

- a. If defendants elect to file a motion to dismiss on the grounds

1 plaintiff failed to exhaust his available administrative remedies as required by 42
 2 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion
 3 pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003), cert. denied
 4 Alameida v. Terhune, 540 U.S. 810 (2003).

5 b. Any motion for summary judgment shall be supported by
 6 adequate factual documentation and shall conform in all respects to Rule 56 of the
 7 Federal Rules of Civil Procedure. **Defendants are advised that summary judgment**
 8 **cannot be granted, nor qualified immunity found, if material facts are in dispute.**
 9 **If any defendant is of the opinion that this case cannot be resolved by summary**
 10 **judgment, he shall so inform the Court prior to the date the summary judgment**
 11 **motion is due.**

12 3. Plaintiff's opposition to the dispositive motion shall be filed with the
 13 Court and served on defendants no later than **thirty (30) days** from the date
 14 defendants' motion is filed.

15 a. In the event the defendants file an unenumerated motion to
 16 dismiss under Rule 12(b), plaintiff is hereby cautioned as follows:¹

17 The defendants have made a motion to dismiss pursuant to Rule
 18 12(b) of the Federal Rules of Civil Procedure, on the ground you
 19 have not exhausted your administrative remedies. The motion
 20 will, if granted, result in the dismissal of your case. When a party
 21 you are suing makes a motion to dismiss for failure to exhaust,
 22 and that motion is properly supported by declarations (or other
 23 sworn testimony) and/or documents, you may not simply rely on
 24 what your complaint says. Instead, you must set out specific
 25 facts in declarations, depositions, answers to interrogatories, or
 26 documents, that contradict the facts shown in the defendant's
 27 declarations and documents and show that you have in fact
 28 exhausted your claims. If you do not submit your own evidence
 in opposition, the motion to dismiss, if appropriate, may be
 granted and the case dismissed.

b. In the event defendants file a motion for summary judgment,

¹ The following notice is adapted from the summary judgment notice to be given to
 pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998)
 (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 the Ninth Circuit has held that the following notice should be given to plaintiffs:

2 The defendants have made a motion for summary judgment by
 3 which they seek to have your case dismissed. A motion for
 4 summary judgment under Rule 56 of the Federal Rules of Civil
 5 Procedure will, if granted, end your case. Rule 56 tells you what
 6 you must do in order to oppose a motion for summary judgment.
 7 Generally, summary judgment must be granted when there is no
 8 genuine issue of material fact--that is, if there is no real dispute
 9 about any fact that would affect the result of your case, the party
 10 who asked for summary judgment is entitled to judgment as a
 11 matter of law, which will end your case. When a party you are
 12 suing makes a motion for summary judgment that is properly
 supported by declarations (or other sworn testimony), you cannot
 simply rely on what your complaint says. Instead, you must set
 out specific facts in declarations, depositions, answers to
 interrogatories, or authenticated documents, as provided in Rule
 56(e), that contradict the facts shown in the defendants'
 declarations and documents and show that there is a genuine issue
 of material fact for trial. If you do not submit your own evidence
 in opposition, summary judgment, if appropriate, may be entered
 against you. If summary judgment is granted in favor of
 defendants, your case will be dismissed and there will be no trial.

13 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is
 14 advised to read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v.
 15 Catrett, 477 U.S. 317 (1986) (holding party opposing summary judgment must come
 16 forward with evidence showing triable issues of material fact on every essential
 17 element of his claim). Plaintiff is cautioned that failure to file an opposition to
 18 defendants' motion for summary judgment may be deemed to be a consent by plaintiff
 19 to the granting of the motion, and granting of judgment against plaintiff without a
 20 trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir. 1995) (per curiam); Brydges
 21 v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

22 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
 23 plaintiff's opposition is filed.

24 5. The motion shall be deemed submitted as of the date the reply brief is
 25 due. No hearing will be held on the motion unless the Court so orders at a later date.

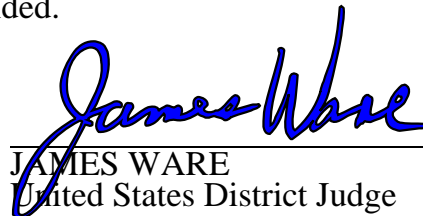
26 6. All communications by the plaintiff with the Court must be served on
 27 defendants, or defendants' counsel once counsel has been designated, by mailing a
 28 true copy of the document to defendants or defendants' counsel.

1 7. Discovery may be taken in accordance with the Federal Rules of Civil
2 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or
3 Local Rule 16-1 is required before the parties may conduct discovery.

4 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep
5 the court informed of any change of address and must comply with the court's orders
6 in a timely fashion. Failure to do so may result in the dismissal of this action for
7 failure to prosecute pursuant to Federal Rule of Civil Procedure 41(b).

8 9 Extensions of time are not favored, though reasonable extensions will be
9 granted. However, the party making the motion for an extension of time is not
10 relieved from his or her duty to comply with the deadlines set by the Court merely by
11 having made a motion for an extension of time. The party making the motion must
12 still meet the deadlines set by the Court until an order addressing the motion for an
13 extension of time is received. Any motion for an extension of time must be filed no
14 later than the deadline sought to be extended.

15
16 DATED: March 14, 2008



JAMES WARE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

JAMES MICHAEL MYRON,
Plaintiff,

Case Number: CV99-21265 JW

CERTIFICATE OF SERVICE

v.

CAL TERHUNE, et al.,

Defendants.

_____/

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 3/20/2008, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

James Myron K-80153
CSP-Ironwood
Ironwood State Prison
P O Box 2199
Blythe, CA 92226

Dated: 3/20/2008

Richard W. Wieking, Clerk
/s/ By: Elizabeth Garcia, Deputy Clerk